



VIA ECFS

October 3, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: PrairieWave Telecommunications, Inc.
Access Charge Reform, CC Docket No. 96-262
Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

On November 12, 2004, PrairieWave Telecommunications, Inc. ("PrairieWave") filed for a waiver of the Commission's CLEC access charge rules 61.26(a)(6), 61.26(b) and 61.26(c) ("Petition"). To date PrairieWave has not had a response from the Commission. In the meantime PrairieWave continues to lose revenues necessary to recover the costs of doing business in rural areas of South Dakota, Minnesota and Iowa.

As a part of the filing in this matter, PrairieWave filed a FLEC study. The study demonstrated that the cost-based, per-minute switching rate for the interstate jurisdiction to be \$0.014942 and for transport \$0.035937, for a composite per minute rate of \$0.050879. The comparable composite NECA rate for a similarly situated ILEC is \$0.026611. The composite rate for the incumbent Qwest for all elements is \$0.0066, which is the rate PrairieWave was obliged to charge effective June 20, 2004 as required by 47 C.F.R. ¶ 61.26(c). The difference in the cost-based pricing, whether demonstrated by the FLEC study or the NECA tariff, and the arbitrarily selected incumbent benchmark, is staggering.¹

Based on the foregoing and while this matter languishes before the Commission, PrairieWave is failing to recover costs of \$0.044276 per minute for every minute it terminates in the interstate jurisdiction in the rural areas it serves. PrairieWave

¹ *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No.96-262, PrairieWave Telecommunications, Inc., Petition for Waiver (filed Nov. 12, 2004) ("Petition"). These comparisons were a part of the Petition as footnote 32 in Exhibit D. The composite NECA rate stated in footnote 32 was amended in PrairieWave's Reply Comments in this docket filed on January 7, 2005.

terminates an average of approximately one million interstate minutes per month in its rural service areas. The lack of cost-based rates results in a lost cost recovery of \$44,276 per month, every month². That is neither fair nor legal. The rules that prohibit PrairieWave from recovering those costs amount to a taking of PrairieWave property without just compensation, a violation of the Fifth Amendment to the United States Constitution.³

PrairieWave is aware of the Commission's open docket on intercarrier compensation, and PrairieWave has submitted comments in that docket.⁴ The completion of that docket and the resulting impact on PrairieWave will not be known for some time. In any event, regardless of the FCC's decision, the implementation of those decisions will, in all probability, be the subject of extensive litigation, which will delay implementation substantially. It is not reasonable to expect PrairieWave to continue to lose revenue pending the resolution of the intercarrier compensation issue.

Accordingly, PrairieWave requests that the Commission expedite consideration of the Petition and provide the relief PrairieWave has requested.

Sincerely,

/s/ William P. Heaston
William P. Heaston
General Counsel
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² If PrairieWave is allowed to use the NECA rate, the resulting cost recovery shortfall is \$0.02011 per minute or \$20,110 per month.

³ The stark differences between the cost-based rates and the arbitrary benchmark rate should provide a basis for a constitutional takings claim as discussed in *Verizon v. FCC*, 535 U.S. 467, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002). The FCC is here presented with the consequences of specific rate orders as applied to PrairieWave. It is the federal court's belief that the FCC would be "more hospitable" to such claims especially where, as discussed in the monograph attached to the Petition (Exhibit D), the reduced rate jeopardizes the financial integrity of PrairieWave. *Id.*, at 523-8 (citations omitted).

⁴ *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 9981, Comments of PrairieWave Telecommunications, Inc., filed May 23, 2005.